PUBLIC PROSECUTOR

v.

MANSOR BIN MD. RASHID & 2 ORS.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN
HJ. ISHAK JC
[CRIMINAL TRIAL NO. 58-10-92]
28 JUNE 1993

DANGEROUS DRUGS: Trafficking - Agent provocateur - Break in chain of evidence - Whether the cannabis that was seized and analysed was the same that wag returned - Informer playing active role - Failure to call or offer - The effect of it - Fingerprints - Sections 37(6), (g), 39B(l)(a), (2), 40(1) DDA 1952 - Evidence Act 1950, s. 114(g).

A police party, wherein one Busra acting as an agent provocateur with the help of Cholar, an informer arrested the accused persons. The 1st and 2nd accused played an active role. The 3rd accused was merely a tenant in the house that was raided. The drugs that was seized was analysed by a Government Chemist. However there was not a shred of evidence adduced by the prosecution as to how the Government Chemist handled the drugs in her office. Cholar, in this case, apart from being an informer, introduced Busra to the 2nd accused and witnessed the purchase of the drugs and also participated in the trap.

Held:

[1] There was not a shred of evidence adduced by the prosecution as to how the Government Chemist handled the compressed plant material in her office. The prosecution failed miserably to show positively the appropriate steps taken by the Government Chemist to assure the safe custody of the compressed plant materials. Now, only the remainder of the plant material in loose forms are put in a transparent plastic packet and marked as exhibit P8. In the state in which the cannabis is now (P8), it is doubtful whether the Government Chemist returned the very same cannabis which she received from Inspector SuhaimiHashim to Inspector Suhaimi Hashim. In short, it is doubtful whether P8 is the very cannabis seized by Badaruddin from house No. 129.

[2] The third accused had no care and management of the premises and therefore he was not occupier for the purposes of the application of the presumptions under s. 37(b) and (g) of the

Act. On the available evidence, the prosecution would have merely established knowledge of the drugs on the part of the third accused. But knowledge, in itself is insufficient to establish possession. The prosecution, must also show that the third accused besides having knowledge of the drugs, also had custody and control of the drugs. But alas, not an iota of evidence was adduced to establish custody and control of the drugs by the third accused.

[3] The informer by the name of Cholar was an active agent provocateur and was not protected by s. 40(1) of the Act, and consequently the failure of the prosecution to call or offer Cholar to the defence would trigger the adverse inference concept under s. 114(g) of the Evidence Act.

[All three accused acquitted and discharged].

Cases referred to:
Public Prosecutor v. Saw AhKow [1993] 2 CLJ 233 (**cit**)
Sun Kam Heng v. PP [1993] 1 CLJ 1091 [1993] 1 AMR 2 (**cit**)
Pang Chee Meng v. PP[1992] 1 CLJ 391 [1992] 2 SCR 1 (**cit**)
Choo Chang Teik & Anor. v. PP [1991] 3 CLJ 2387/ [1992] 1 SCR 475 (**cit**)
Wong Yew Ming v. Public Prosecutor [1991] 1 MLJ 31SC (**cit**)
Public Prosecutor v. Adetunji Adeleye Sule [1993] 3 CLJ 113/[1993] 1 AMR 24 (**foll**)
Namasiyam & Ors. v. Public Prosecutor [1987] CLJ 540/[1987] 2 MLJ 336 SC (**cit**)
Munusamy v. Public Prosecutor [1987] CLJ 250/[1987] 2 MLJ 492 SC (**foll**)
Public Prosecutor v. Neoh Seow Aun (Perak Criminal Trial No. 12 of 1985) (**cit**)
State of Patna v. Karu Gope [1954] Pat 131 (**cit**)
Phool Kumar v. Delhi Administration [1975] AIR SC 905/[1975] Cr. L.R. (SC) 272 (**cit**)
Bhaluka Behera v. The State [1957] Orissa 172
Lee Chee Meng v. Public Prosecutor [1992] 1 SCR 483/ [1992] 1 CLJ 345 SC
Sia Soon Suan v. PP [1966] 1 MLJ 116 (**cit**)

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(b) (d) (da)(vi) (g), 39B(lXa)(2),40(l)
Evidence Act, s. 114(g)
Penal Code, s. 34
Penal Code, s. 34 (India)

Other sources referred to:
Ratanlal and Dhirajlal's **Law Of Crimes**, 23rd Edn., p. 104

For the public prosecutor - Sapini Mat Saman, DPP
For the three accused - Jula Singh; M/s. Paramjit & Co.

JUDGMENT

Haji Abdul Malik bin Hj. Ishak JC:
The three accused were charged as follows:

> Bahawa kamu bersama-sama pada 31 Julai 1991 jam lebih kurang 1.30 pagi di rumah No. 129, Jalan 17, Taman Kuning Sari, Taiping di dalam Daerah Larut dan Matang di dalam Negeri Perak Darul Ridzuan telah mengedar dadah berbahaya iaitu ganja seberat 902 gram dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah s.39B(l)(a) Akta Dadah Berbahaya, No. 234/52 dan boleh dihukum di bawah s. 39B(2) Akta yang sama dan dibaca bersama s. 34 Kanun Kesiksaan.

The prosecution's case was that, acting on certain information received, ASP Badaruddin bin Hj. Zafari (PW8 - "Badaruddin") directed on 17 July 1991 at 4.00 p.m. Detective Corporal 70718 d Busra bin Abdul Kadir (PW9 - "Busra") to investigate a drug trafficking syndicate operating in the areas of Lenggong and Taiping. To assist Busra, Badaruddin had on 18 July 1991 at 3.15 p.m. at rest house Lenggong, introduced the informer (by the name of "Cholar") to him. Having being acquainted with the informer, both Busra and the informer then proceeded by motorcycle on the same day (18 July 1991) at 3.30p.m. to meet the target at Lawin, in the area of Lenggong. In due course, at the coffeeshop at Lawin, Busra who acted as an agent *provocateur* was introduced by the informer to the target, a male Malay by the name of Ideris (identified as the second accused). The informer introduced Busra to the second accused as "kita satu line" and the discussions between them centred on the supply of drugs. The second accused stated that the drugs were kept in Taiping, by his partner and that he would introduce Busra to his partner at an appropriate time. Busra then directed the informer to accompany the second accused to Taiping to meet the partner in question. Busra himself boarded a bus back to Lenggong and upon arrival at Lenggong's rest house, briefed Badaruddin accordingly. Badaruddin directed Busra to conduct follow-up operations by meeting the second accused and his partner.

On 22 July 1991 at about 8.00 p.m., at Kuala Kangsar's rest house, Badaruddin directed Busra and the informer to proceed to Taiping to meet the second accused and his partner. Both then i proceeded by motorcycle and went to house No.

129, Jalan 17, Taman Kuning Sari, Taiping ("house No. 129") at about 9.30 p.m. on the same day. At house No. 129, the second accused introduced Busra to a male Malay by the name of Mansor or Chot (identified as the first accused). According to Busra at that time in house No. 129 there was another male Malay, thin, fair skin with black hair seated on the cement of the said house who was not introduced to him and that person is not in Court now. Again, according to Busra at that time in house No. 129, the third accused was not there too.

The owner of house No. 129 is Abdul Hamid bin Hassan (PW5 - "Hamid") and together with his younger brother by the name of Abdul Rashid bin Hassan (PW6 - "Rashid") delegated to Azian bte Abas (PW7 - "Azian") the powers of securing tenants to the said house. This was subsequently done by Azian. She successfully negotiated rental of the said house to the three accused persons and one other person by the name of Amran.

According to Busra, the meeting on 22 July 1991 at about 9.30 p.m. at house No. 129 was successful. Busra discussed with the first accused about the supply of drugs. In this meeting, the first accused agreed to sell 1 kilo of ganja at RM 1,500. In this meeting also, Busra purchased 1 kati of ganja atRMl,000 from the first accused in the presence of the second accused. Again, in this meeting Busra agreed to return and purchase 2 kilos of ganja at RM1.500 per kilo and the first accused requested Busra to come on 31 July 1991 at night.

On their return to Kuala Kangsar's rest house, Busra briefed Badaruddin about what had transpired in house No. 129. Badaruddin directed Busra to keep his appointment with the first accused at the appointed time and place.

On 30 July 1991 at 10.45 p.m. at Taiping's rest house, Badaruddin briefed his police personnel about his intended raid on house No. 129 on 31 July 1991. All the police personnel were given roles to play, in particular Busra was directed to act as an agent provocateur and to proceed to house No. 129on31 July 1991 with the informer to purchase the drugs from the targets. Busra was also directed to press the remote control to the car alarm in order to activate the car alarm system as a signal to arrest the targets, once the sale of the drugs were transacted. The informer did not attend this briefing.

On 31 July 1991 at about 12.20 a.m., Busra drove his Proton Saga car ABS 6577 together with the informer, who was seated next to him, to house No. 129. On the way, as requested by the second accused, Busra stopped at house No. 374, Taman Seri Kemuning, Taiping ("house No. 374") to collect the second accused. Having •collected the second accused, all three then proceeded to house No. 129 and arrived there at 12.50 a.m. Busra parked his Proton Saga car in front of house No. 129 (as per photograph P12B) and all the three of them then entered house No. 129. Incidentally, earlier on at 12.45 a.m. on the same day, a red Toyota Corona BED 7216 arrived and parked in the compound of house No. 129. Two male Malays were seen alighting from the car BBU 7216 and entered the house No 129. Badaruddin and Detective Constable 89457 Selvarajah a/1 Muniandy (PW10 - "Selvarajah") together with some members of the police party who took up ambush positions at an elevated empty land overgrown with bushes, about 25 meters opposite house No. 129 (see photograph P12A), saw the arrival of both these two cars and the passengers therein.

As stated earlier, Busra, the informer and the second accused entered house No. 129. Upon entry, Busra saw at the living room, the first accused and a male Malay known as Khasim (identified as the third accused), seated on the chairs. After the formal Malay greetings were exchanged, Busra, the informer and the second accused sat on the chairs in the living room. The first and third accused persons then excused themselves (to change their clothes) and the first accused was seen entering the bedroom at 'K' in P23 while the third accused entered one of the bedrooms at the rear portion of the house. A short while later, both the first and third accused rejoined them at the living room. The second accused was seen proceeding to the kitchen portion and prepared drinks. All of them then had drinks prepared by the second accused. According to Busra, they talked on general subjects for about 35 to 40 minutes, whereupon Busra then enquired of the first accused as to the supply of ganja which was promised on 22 July 1991. The first accused told Busra that the supply of ganja was inadequate and that he only had 1 kilo of ganja at the price of RM1,500. Busra agreed to purchase the 1 kilo of ganja at the price stipulated by the first accused and accordingly Busra requested to see the ganja. The first accused then directed the

second accused: "Deris, pi siapkan barang" in Kedah dialect. The second accused was seen entering the bedroom at "K" in P23 and between 15 to 20 seconds later he came out **and carried a newspaper package** and handed it to Busra who then placed it on the table.

According to Busra, he opened the newspaper (P6) package in the presence of the three accused persons and the informer. At the time, the third accused was only wearingabath towel. On opening the newspaper package, Busra saw compressed dried leaves bound with a white plastic and a yellow loy-tape (see photographs P11A and P11B). However, when Busra was about to re-wrap the compressed dried leaves with the same newspaper (P6), the third accused announced his intention to take a bath and he then left the living room. After re-wrapping the compressed dried leaves with the same newspaper (P6) Busra placed the newspa-,, per package on the cushion of the chair (see photograph P12E marked 'X' in red). Busra then pretended and told the first accused that he kept his money in the car and he then directed the informer to take the money from his *Proton Saga* car. Dutifully the informer complied and left house No. 129 at 1.30 a.m. This was seen by Badaruddin and Selvarajah. Once the informer had left the compound of house No. 129, Busra again pretended that he wanted to go to the toilet. As Busra was about to proceed to the bathroom, he then pressed the remote control in order to activate the car alarm system of his Proton Saga. This was done. A loud siren was heard. At that time, the first and the second accused were still seated in the living room while the third accused was having his bath in the bathroom.

On hearing the loud siren, Badaruddin and his police party rushed in via the front door into house No. 129. As Badaruddin entered the living room, he saw both the first and second accused seated on the chairs and he shouted: "POLIS JANGAN BERGERAK" However, the second accused who was wearing an orange coloured shirt, managed to run out of the house through the front door. Badaruddin then acted swiftly and he managed to arrest the first accused. Ashort while later, Selvarajah and two other police personnel brought in the second accused. Fortunately, Selvarajah managed to arrest the second accused inside the compound of house No. 129. Meanwhile, Busra made his exit via the back door of house No. 129 as soon as Badaruddin had entered the living room. The gate of the rear fence was unlocked (see photograph P12K) and Busra quietly made his exit. As soon as Busra opened the back door of house No. 129, Detective Sergeant Major Razali bin Hj. Abdul Majid (PW11 - "Razali") and Constable Manoharan entered and arrested the third accused, who was at that time naked and having his bath in the bathroom. Razali then took the third accused (by now covered with a towel) to the living room area.

All the three accused persons were assembled and guarded in the living room of house No. 129 where Badaruddin then proceeded to examine the said house. At the living room area near to the cushion at point marked "X" in photograph P12E, Badaruddin found a newspaper package. In the presence of the three accused persons. Badaruddin opened the newspaper package and found compressed dried leaves bound with a white plastic and yellow loy tape (see photographs P11A and PUB) suspected to be ganja. Thereafter, Badaruddin re-wrapped the compressed dried leaves suspected to be ganja with the same newspaper. Next, Badaruddin then proceeded to examine the bedroom at "K" in P23 and in the presence of the three accused persons, found: (1) abrown leather clutch bag (P14) on the bed as shown in photograph P12H (2) a bunch of keys (P22) and the 3 keys (P19) to motor car BBD 7216 on the dressing table as shown in photograph P12H. In fact, soon thereafter, the rest of the interior portion of house No. 129 was examined by Badaruddin and nothing incriminating was found therein. There was evidence that throughout the entire examination of the interior portion of house No. 129, Badaruddin continued to hold onto the newspaper package containing the compressed dried leaves suspected to be ganja (see photographs P11A and P11B).

From the scene, Badaruddin then brought the exhibits together with the three accused persons escorted by police personnel, to the office of the Anti-Narcotics Division at Taiping police station on the same day at about 2.35 a.m. Again, in the office of the investigating officer, Badaruddin examined the contents of the newspaper package and marked them accordingly. The newspaper (P6) was marked as "BZ", signed and dated by Badaruddin whereas the compressed dried leaves bound with a white plastic and yellow loy-tape was marked "BZ2" and also signed by Badaruddin. Badaruddin also lodged

a police report *vide* Pokok Assam report No. 667/a 91 which report number was also written by Badaruddin on the newspaper (P6) and on the white plastic and yellow loy-tape that bound the compressed dried leaves. Badaruddin also examined the brown leather clutch bag (P14) and found it contained RM3.691 (P15). Thereafter, the exhibits were handed to the investigating officer, one Inspector Suhaimi Hashim (PW13).

A search list (P24) was also prepared by Badaruddin.

In due course, the Government Chemist (PW1) examined and analysed the compressed dried leaves and confirmed it to be 902 grammes of cannabis as defined under s. 2 of the Dangerous Drugs Act 1952 ("the Act") and constituted the subject matter of the charge.

At the close of the case for the prosecution, I held that the prosecution had failed to establish a *prima facie* case against the three accused persons which, if unrebutted, would warrant their conviction. Without hesitation, I acquitted and discharged the three accused persons without calling for their defence. There are several aspects of the evidence given by the prosecution's witnesses which taken individually or cumulatively raised a real doubt in my mind.

Firstly, the evidence adduced by the Government Chemist (PW1), was far from satisfactory. In point of fact, her testimony shows not only the cavalier manner in which the incriminating exhibits, which forms the material particulars of the charge, were handled but also the easy manner by which she deposed to the way the incriminating exhibits were examined and analysed which leaves in my mind the patent weakness in the prosecution's case.

The Government Chemist (PW1) deposed that she received on 1 August 1991 at about 2.30 p.m. a package marked "E" and sealed with "Polis Di Raja Malaysia 92" seal from Inspector Suhaimi bin Hashim. She then opened the package in the presence of the said Inspector and found a newspaper wrapper containing one slab of compressed plant material which was wrapped with plastic sheet and loy-tape. An acknowledgment receipt (P9) was then issued to the said Inspector. The Government chemist then exam - ined and analysed the compressed plant material according to the usual procedures and confirmed the suspicions of Badaruddin and Busra, that it did contain cannabis, a dangerous drug within the meaning of s. 2 of the Act, having a net weight of 902 grammes. At first blush, what the Government chemist did was perfectly in order. But a close scrutiny would indicate a patent break in the chain of evidence pertaining to the compressed plant material. There was not a shred of evidence adduced by the prosecution as to how the Government chemist handled the compressed plant material in her office. The prosecution failed miserably to show positively the appropriate steps taken by the Government chemist to ensure the safe custody of the compressed plant materials. Now, only the remainder of the plant material in loose form are put in a transparent plastic packet and marked as exhibit P8. In the state in which the cannabis is in now (P8), it is doubtful whether the Government chemist returned the very same cannabis which she received from Inspector Suhaimi Hashim to Inspector Suhaimi Hashim. In short, it is doubtful whether exhibit P8 is the very cannabis seized by Badaruddin from house No. 129. It must be borne in mind that in 1991 there were 9 Government chemists, including (PW1), working in the Chemistry Department, Ipoh, Perak. That the other Government Chemists would also be engaged in analysing cannabis from other cases cannot be ruled out, and that a possible mix-up in the cannabis with that of the cannabis in this case cannot also be ruled out, particularly when there was no evidence where the cannabis in this case was kept and whether it was kept under lock and key. There was meticulous evidence led by the prosecution in regard to the movements of the exhibits when they were in the hands of the police. Surely such requirements should also be placed on the Government chemists bearing in mind that there are a lot of exhibits from other cases that are kept by the Government chemists for analysis (see the cases discussed in *Public Prosecutor v. Saw Ah Kow* [1993] 2 CLJ 233 in regard to the need in maintaining the chain of evidence relating to the identity of the drugs). Recently, the Supreme Court in the case of *Sun Kum Heng v. PP* [1993] 1 AMR 2 at p. 49 had to decide whether the prosecution had proved its case beyond reasonable doubt, especially in relation to the absence of evidence of authentication of the seizure of the firearm. In that case, there was a gap in the prosecution's case regarding the lack of evidence on the whereabouts of the firearm during the three days, from 18 January 1987 when it was snatched from the appellant, to 21 January 1987 when it was sent to the armourer.

Edgar Joseph Jr. SCJ speaking for the Supreme Court had this to say:

> It goes without saying that the burden was upon the prosecution from beginning to end and from first to last to prove beyond reasonable doubt that the subject matter of the charges, being the revolver (P3) with the ammunition in it (P9B), which had been produced in the Court below was the very thing described as a revolver, which had been snatched from the hand of the appellant on the date and at the time and place mentioned in the charges.

Likewise, in the present case, the cannabis was with the Government chemist from 1 August 1991 at about 2.30 p.m. till 18 October 1991 at 11.05 a.m., a span of 2 months 17 days, before it was returned to Inspector Suhaimi bin Hashim. Bereft of the evidence from the Government chemist as to how she handled the cannabis for the period of 2 months 17 days, it cannot therefore be said that that was the very cannabis (the compressed plant material) that Badaruddin seized from the living room of house No. 129.

Secondly, in regard to the evidence as adduced by the prosecution, the,role played by the third accused was hardly incriminating. On 22 July 1991 at about 9.30 p.m. when Busra purchased 1 katiof ganja at RM1.000 from the first accused at house No. 129, only the second accused and one other male Malay accused was not introduced to Busra were present. The third accused was not present during this sale and purchase transaction. Again, on 31 July 1991 at about 1.30 a.m. when Busra was enquiring of the first accused in regard to the ganja at house No. 129, it was the first and second accused that played major roles. The first accused actively discussed with Busra about the supply of ganja and subsequently directed the second accused to fetch the ganja in the bedroom. The second accused took, carried and handed the ganja (the compressed plant material wrapped in newspaper (P6)) to Busra. There was manual possession by the second accused of the ganja. However, the third accused did not do anything. The third accused even decided to take his bath while Busra was re-wrapping the compressed plant material in the newspaper. The third accused cannot be said to be snaring the common intention of the first and second accused. His mere presence on 31 July 1991 at about 1.30 a.m. in house No. 129 cannot raise the presumption of complicity nor should he be punished for it. Ratanlal and Dhirajlal's **Law Of Crimes**, 23rd Edn., at p. 104 had this to say about s. 34 of the Indian Penal Code:

> Although a man is present when a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it, or to apprehend the felon. All who are present do not necessarily assist by their presence every act that is done in their presence, nor are they consequently liable to be punished as principals (Gora Chand Gopee [1896] 4 WR (Or.) 45; Beng L.R. (Sup. Vol) 443; Gurusami Tevan [1936] MWN 177. See Coney [1882] 8 QBD 534. See also Sawal Das [1974] Cr. L.J. 664: AIR (1974) SC 778). There must be community of design to make the person liable (Basharat [1934] 36 PLR 37: 36 Cr. L.J. 308: AIR [1934] (L) 813; Mahadeo Nath [1940] 22 PLT 1035: 42 Cr. L.J. 603: AIR (1941) (P) 550; Dhayagude [1977] Cr. L.J. 238: AIR [1977] SC 381; Abdul Salam [1973] Ker. L.T. 977: 1973 Mad. L.J. (Cr.) 611).

I would go so far as to hold that the third accused had no care and management of the premises and therefore he was not an occupier for the purposes of the application of the presumptions under ss. 37(b) and (g) of the Act. On the available evidence, the prosecution would have merely established knowledge of the drugs on the part of the third accused. But knowledge, in itself is insufficient to establish possession. The prosecution, must also show that the third accused besides having knowledge of the drugs, also had custody and control of the drugs. But alas, not an iota of evidence was adduced to establish custody and control of the drugs by the third accused. Throughout the trial, absolutely no evidence was adduced against the third accused except when he was present with the first and second accused and Amran, when Azian handed the keys to house No. 129 to Amran.

The accessibility of house No. 129 to Amran raises another problem. Generally speaking, if no exclusive use or occupation of room "K" in P23 or house No. 129 can be established, especially in the light of the available evidence: that Amran was given the keys to house No. 129 by Azian; that Busra saw a male Malay on 22 July 1991 at about 9.30 p.m. when he purchased 1 kati of ganja from the first accused and in the presence of the second accused, was none other than

Amran (the defence version while cross-examining Busra, which version was accepted by the Court); and that Amran occupied room "K" in P23 as reflected in the cautioned statement of the first accused (D25), in short, Amran had access or occupation of the premises, then it cannot be said that the three accused persons had exclusive custody and control of the drugs found in room "K" in P23. By way of an analogy, reference may be made to cases establishing custody and control of the drugs for the purposes of rebutting the presumptions under s. 37(d) of the Act. These cases are:

In *Lee Chee Meng v. PP* [1992] 1 SCR 483, where the Supreme Court held that the fact that at the time of the arrest of the accused in the room, there was another person, indicated that the accused did not have exclusive use of the room, Hashim Yeop Sani CJ Malaya (as he then was) further pointed out that this fact alone was sufficient to acquit the accused.

In *Pang Chee Meng v. PP* [1992] 2 SCR 1, Lord President Tun Abdul Hamid bin Haji Omar held that the trial Judge was wrong in holding that the accused had exclusive possession when there were others sharing the house.

In *Choo Chang Teik & Anor. v. PP* [1992] 1 SCR 475, the Supreme Court held that on the proper assessment of the evidence, it was probable that both the accused had no knowledge of the drugs in the travelling bag recovered from the toilet of the master bedroom.

I am not unmindful of the fact that the purchase of 1 kati of ganja on 22 July 1991 at about 9.30 p.m. by Busra from the first accused and in the presence of the second accused would be admissible to show system and knowledge that the possession is not accidental (see *Wong Yew Ming v. Public Prosecutor* [1991] 1MLJ 31 SC) I am also not unmindful of the fact that the second accused was in manual possession of the newspaper package containing the compressed plant material (the cannabis) and consequently the second accused was in possession of the cannabis and to have known the nature of such drug, by reason of s. 37(d) of the Act, and further was to be presumed, until the contrary was proved, to be trafficking such drug, by reason of s. 37(da)(vi) of the Act. In the recent decision of the Supreme Court in *Public Prosecutor v. Adetunji deleye Sule* [1993] 1 AMR 24 at p. 991),Edgar JosephJr. SCJhadtodecide whether the trial Judge was right in acquitting the respondent at the close of the prosecution case based on the conduct and demeanour of the respondent and on the exculpatory cautioned statement of the respondent. From the facts in that case, it was clear that the respondent was in manual possession of the trunk and that the heroin was recovered from a secret compartment therein. His Lordship speaking for the Supreme Court held that neither the respondent's conduct and demeanour nor his cautioned statement should have constituted "proof to the contrary" sufficient to rebut the statutory presumption raised against him and should not be made the foundation of an order of acquittal at the close of the case for the prosecution. They are, according to his Lordship, factors which may be taken into account when considering the weight which should be accorded to the defence. However, at the outset, it must be stressed that there is a world of difference between this case and that of *Public Prosecutor v. Adetunji Adeleye Sule (supra).* In this case, there is a serious break in the chain of evidence pertaining to the cannabis while they were in the custody of the Government chemist, which struck at the very core of the charge against not only the second accused but also against the first and the third accused similar to the situation in *Sun Kam Heng v. PP (supra).* And notwithstanding the presumptions under ss. 37(d) and 37(daXvi) of the Act, the serious break in the chain of evidence in regard to the cannabis while they were in the hands of the Government chemist, would entitle the three accused persons to an acquittal without their defence being called at all.

Thirdly, the informer by the name of Cholar played an active part from the beginning till the end of the episode by introducing, on 18 July 1991 at 3.30 p.m., Busra to the second accused at the coffeeshop at Lawin; by accompanying Busra on 22 July 1991 at about 8.00 p.m. to house No. 129 and there saw the second accused introducing Busra to the first accused, and consequently witnessed the purchase of 1 kati of ganja at RM1.000 by Busra from the first accused; by accompanying Busra and the second accused on 31 July 1991 at about 12.20 a.m. to house No. 129 and was present throughout the discussions between the first accused and Busra in regard to the purchase of the drugs - in short, the informer participated in the trap set up by Badaruddin which eventually led to the arrest

of the three accused persons and the seizure of the drugs. In *Namasiyam & Ors. v. Public Prosecutor* [1987] 2 MLJ 336 SC, the Supreme Court had occasion to consider (though the point was not fully canvassed before the Supreme Court) the role of the informer by the name of Francis who was clearly aparticeps criminis, an accomplice in the true sense of the word, as he played an active part throughout the case. It was submitted that the absence of Francis at the trial would raise the presumption under s. 114(g) of the Evidence Act unfavourable to the prosecution. Unfortunately, the Supreme Court brushed aside this novel submission by merely stating:

> Be that as it may, in the light of overwhelming prosecution evidence as stated earlier, we do not think that the presence of Francis, had he been available, would have made any difference.

The Supreme Court in yet another case, *viz Munusamy v. Public Prosecutor* [1987] 2 MLJ 492 SC cited favourably the decision of Anuar J. in the unreported case of *Public Prosecutor v. Neoh Seow Aun* (Perak Criminal Trial No. 12 of 1985) where two informers who had played very active part in the commission of the offence by the accused, were not called or offered to the defence by the prosecution, and it was successfully argued that they were not in fact informers within the meaning of s. 40(1) of the Act and as such the adverse inference under s. 114(g) of the Evidence Act applied. The Public Prosecutor's appeal (against the acquittal by Anuar J.) was eventually withdrawn. This is what Mohamed Azmi SCJ had to say about the role of an informer:

> In our opinion whether a person is an informer or has become an active agent provoca-teur would depend on the facts of each particular case. In the instant case the protection under s. 40(1) clearly applies since the evidence showed that all the informer did was to accompany DPC Lian on the 14th and introduce him to the appellant. Accordingly there is no merit in the argument that the learned Judge ought to have invoked the adverse presumption under s. 114 (g).

Now from the recital of the facts showing the role of the informer in the present case, it is clear that Cholar not only introduced Busra to the second accused but went further by witnessing the purchase oif 1 kati of ganja on 22 February 1991 from the first accused at house No. 129 and participated in the trap, nicely planned, by Badaruddin on 31 July 1991 which led to the arrest of the three accused persons and the seizure of the drugs. On the facts, therefore, following the guidelines set by Mohamed Azmi SCJ in *Munusamy v. Public Prosecutor (supra),* it can therefore be said that the informer by the name of Cholar was an active agent *provocateur* and was not protected by s. 40(1) of the Act, and consequently the failure of the prosecution to call or offer Cholar to the defence would trigger the adverse inference concept under s. 114 (g) of the Evidence Act.

Fourthly, when Azian negotiated with the three accused persons for the rental of house No. 129 on behalf of the house owner, there was another Malay man by the name of Amran who gave RM240 as three months' rental in advance to her. According to Azian, Amran took the money from Mansor (the first accused) and then handed the money to her. She then handed the keys to house No. 129 to Amran. Again, on 22 July 1991 ataboutS.OOp.m. when Busra purchased 1 kati of ganja at RM1.000 from the first accused at house No. 129, there was a male Malay, described by Busra to be thin, fair skinned and with black hair who was seen seated on the cement of the said house and that person was not introduced to Busra. Busra was cross-examined at length to establish that that male Malay was Amran and consequently the defence submitted that Amran was not a fictitious character.

Now, in so far as Amran is concerned, it was the submission of the learned defence Counsel that Amran was not an imaginary character but real as confirmed by an independent prosecution witness by the name of Azian. The existence of Amran was also put across to Busra in cross-examination. Even the investigating officer, one Inspector Suhaimi Hashim agreed that in the course of his investigations, a male Malay by the name of Amran surfaced. The name of Amran was also mentioned by the first accused in his cautioned statement (D25). At this stage, it must be stressed that the salutary warning by Edgar Joseph Jr. SCJ in *Public Prosecutor v. Adetunji Adeleye Sule (supra)* that the exculpatory cautioned statement of an accused person cannot be made the foundation of an order of acquittal at the close of the case for the prosecution where an accused person was found to be in manual possession of the drugs, was taken into consideration. But, in so far as the first and the

third accused persons are concerned, they were not found in manual possession of the newspaper package containing the drugs. Only the first accused in his cautioned statement (D25) spoke of Amran. There was no mention of an individual by the name of Amran by the second accused in his cautioned statement (D26). Be that as it may, on the evidence of Azian and Inspector Suhaimi Hashim, I hold that an individual by the name of Amran existed and consequently the failure to offer or call him would automatically trigger off the invocation of the adverse inference under s. 114(g) of the Evidence Act.

Fifthly, there was no evidence as to what had happened to the 1 kati of ganja which Busra bought from the first accused in the presence of the second accused and that unknown male Malay of 22 July 1991 at about 9.30 p.m. at house No. 129. Was the 1 kati of ganja handed to Badaruddin? Did Inspector Suhaimi Hashim (the investigating officer) take custody of the 1 kati of ganja? If so, what did Inspector Suhaimi Hashim do with it?

Sixthly, the investigations conducted by Inspector Suhaimi did not show that fingerprints were lifted from the newspaper (P6) and the white plastic and loy-tape (P7 and P7A) that covered the compressed dried leaves. Nor was there evidence to show that fingerprint clippings or hand swabs were taken from the three accused persons. Without a doubt, these are vital evidence linking the three accused persons to the drugs in question. For instance, in the *State of Patna v. Karu Gope* [1954] Pat 131, the opinion of the fingerprint expert was considered sufficient for upholding the conviction of the accused. The Court remarked that the expert must give his reasons for the opinions on the report he submits. Again, in *Phool Kumar v. Delhi Administration* [1975] AIR SC 905 [1975] Cr.L.R.(SC) 272, the clinching evidence against the appellant was his thumb-impression on the kunda of the cash-box. It was conclusively proved to be his on the opinion of the expert. The report of the expert was used as evidence by the prosecution without examining him in Court. Then again it was held, in *Bhaluka Behera v. The State* [1957] Orissa 172, that if the fingerprints are clear enough the Court can verify the evidence of the expert by examining them with a magnifying glass, and can apply its own mind to the similarities and dissimilarities afforded by the fingerprints, before coming to a conclusion one way or the other. If fingerprint expert's examination is thorough, complete and scientific, there should be no difficulty even on basing the conviction on his evidence alone. These cases all point to the importance of fingerprint evidence, which evidence are not available in the present case.

Seventhly, there is one aspect of the investigation which called for comment. It is this. The investigating officer proceeded to the scene, that is, house No. 129 on 2 August 1991 accompanied especially by Badaruddin, the first accused and the police photographer. The investigating officer caused the police photographer to take photographs P12A to P12L and the investigating officer drew the sketch plan and the key to the sketch plan of house No. 129. It must be inferred (and this is a reasonable inference) that Badaruddin must have briefed the investigating officer about the facts of the case and therefore the investigating officer should be familiar with the facts of the case and should know what to look for in the course of his investigations. Yet, the investigating officer failed to cause the photographs of the street lights in relation to house No. 129 to be taken nor did he incorporate in the sketch plan the presence of the street lights, vital items to support the prosecution case that the area was lighted that morning during the raid. So much for the poor quality of the police investigation.

Lastly, from the evidence of Azian, four people rented the house No. 129. These four people were the three accused persons and one Amran. The drugs were found in room "K" in P23 which according to Busra, that room was occupied by the first accused. As against this, the first accused in his cautioned statement (D25), stated that that room (room "K" in P23) belonged to Amran. The investigating officer did not retrieve any men's clothing or personal effects from room "K" in P23 when he visited house 129 with Badaruddin and the police party. Neither did Badaruddin and his police party on the day of the raid in house 129 seize men's clothing or personal effects from room "K" in P23. This means that there is no positive proof by the prosecution as to the exclusive use of the room at "K" in P23 by the first accused in which the offending drugs were found. It must be borne in mind that according to Azian, she handed the keys to house No. 129 to Amran. Seen in this angle, there is also no conclusive evidence that the three accused persons had exclusive use of

house No. 129 (*Lee Chee Meng v. Public Prosecutor* [1992] 1 CLJ 345 SC).

On scrutiny of the testimonies of the government chemist, Busra, Badaruddiri and the rest of the raiding party together with the investigating officer of the case, it could not be said that the prosecution had established a *prima facie* case against the three accused persons.

In a criminal trial of this nature which carries the mandatory death sentence, the Court cannot relax the requirements of strict proof to bridge any material gap in the prosecution evidence (*Sia Soon Suan v. PP* [1966] 1 MLJ 116). Since the prosecution had failed to establish a prima facie case which, if unrebutted, would warrant the conviction of the three accused persons, the Court had no choice but to acquit and discharge them without calling for their defence.

Order accordingly.

PUBLIC PROSECUTOR

v.

MOHD. NOOH BIN YUSOF & 2 ORS.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL TRIAL NO. 58-6-92]
2 JULY 1993

SENTENCE: Dangerous Drugs Act 1052 - Section 39A(2) - Accused pleaded guilty to amended charge.

In this case, the 1st and 3rd accused pleaded guilty to the amended charge under a. 39A(2) of the Dangerous Drugs Act 1952 (Act 234). The Court having satisfied itself that both the accused persons understood the nature and consequences of their plea, forthwith recorded their plea of guilt and convicted them accordingly. The 1st accused was sentenced to 6 years' imprisonment with effect from the date of his arrest and ordered to receive 10 strdkes of the rattan. He was also ordered to undergo his term of imprisonment at Kajang prisons. The 3rd accused was sentenced 6 years' imprisonment with effect from the date of his arrest and ordered to receive 10 strokes of the rattan. He was ordered to undergo his term of imprisonment at Alor Setar prison.

Held:

[1] The Court gave a one-third discount or credit for their plea of guilty following the Supreme Court's decision in *Mohamed Abdullah Ang Swee Keng v. DPP* [1988] 1 MLJ 167 SC

[2] The maximum punishment should be reserved for the worst possible example of the offence under s. 39A(2) of the Dangerous Drugs Act 1952 (Act 234). However, the facts in the present case is not an example of the "worst possible example" for an offence under s. 39(2) of the said Act.

[3] The first accused was sentenced to 6 years imprisonment with effect from the date of his arrest and ordered to receive 10 strokes of the rattan. He was also ordered to undergo his term of imprisonment at Kajang prisons. The third accused was sentenced to 6 years' imprisonment with effect from the date of his arrest and ordered to receive 10 strokes of the rattan. He was ordereq to undergo his term of imprisonment at Alor Setar prisons.

[Orders accordingly].